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(3)

No. 05-1629

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In the decision below, the Ninth Circuit applied its holding in *Penuliar* v. *Gonzales*, 435 F.3d 961, 970 n.6 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006), that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense'" under the "aggravated felony" provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(G). As the petition demonstrates (at 6-25), that holding is incorrect; it conflicts with decisions of other courts of appeals; and, if left unreviewed, it will have a substantial effect on the administration of the immigration laws.[1] Respondent does not seriously dispute any of those propositions. Instead, he contends (Br. in Opp. 8-17) that the issue raised in the petition is not presented in this case, because the decision below did not rest on the ground that "theft offense" excludes aiding and abetting; he contends (*id.* at 17-26) that, even if the decision did rest on that ground, a ruling in the government's favor would not change the outcome, because California Vehicle Code § 10851(a) (West 2000) imposes liability on accessories after the fact, who are not covered by the generic definition of "theft offense"; and he contends (Br. in Opp. 28-29) that it would in any event be premature for the Court to grant certiorari, because the Ninth Circuit recently granted rehearing en banc in *United States* v. *Vidal*, 426 F.3d 1011 (2005), rehearing granted, 453 F.3d 1114 (2006), which presents the question whether a violation of Section 10851(a) is a "theft offense" under the Sentencing Guidelines. Each of those contentions is without merit.

[1] Since the petition was filed, the Fifth Circuit has held that aiding and abetting bank fraud is an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), which covers offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000." *James* v. *Gonzales*, No. 04-60445, 2006 WL 2536614, at *2-*3 (Sept. 5, 2006).

A. The Question Presented In The Petition Is Squarely Presented In This Case

Relying on the fact that California Vehicle Code § 10851(a) includes the term "accessory" and that "accessory" as used in California Penal Code § 32 (West 1999) is an accessory after the fact (which is distinct from an aider and abettor), respondent interprets *Penuliar* as holding that Section 10851(a) is broader than the generic definition of "theft offense," not because "aiding and abetting liability is not included in the generic definition," but because Section 10851(a) "reaches accessories after the fact." Br. in Opp. 6-7. As a consequence, according to respondent, the question presented in the petition "does not * * * pertain to the holding in *Penuliar*." *Id.* at 14. Respondent is mistaken, because his description of the rationale for *Penuliar*'s holding is inaccurate. The decision in that case (and therefore in this one) rested squarely on the ground that Section 10851(a) covers aiding and abetting.

In holding that a violation of Section 10851(a) is not categorically a "theft offense" in *Penuliar*, the Ninth Circuit explained that it had held in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), that "a conviction under California's general theft statute, California Penal Code § 484(a), was not a categorical 'theft offense'" in part because "a defendant can be convicted of the substantive offense for aiding and abetting a theft." *Penuliar*, 435 F.3d at 969. The court went on to say that it had "recently applied this same reasoning" in *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (2005), which held that "a grand theft conviction under California Penal Code § 487(c) did not categorically constitute a theft offense" because "a defendant can be convicted of a substantive violation of § 487(c) based on an aiding and abetting theory alone." *Penuliar*, 435 F.3d at 969 (quoting *Martinez-Perez*, 417 F.3d at 1028). The court then held that "[a] conviction under California's vehicle theft statute is broader than

the generic definition of a 'theft offense' * * * *for the same reason*," and quoted a California decision for the proposition that Section 10851(a) permits a conviction if the defendant "aided or assisted" in the driving with the requisite state of mind. *Id.* at 969-970 (emphasis added) (quoting *People* v. *Clark*, 251 Cal. App. 2d 868, 874 (1967)). In so holding, the court rejected the contention raised in the government's rehearing petition that "aiding and abetting liability is included in the generic definition of a 'theft offense,'" finding it foreclosed by *Martinez-Perez*. *Id.* at 970 n.6. Nowhere in its decision in *Penuliar* did the Ninth Circuit rely upon, address, or even mention the theory advanced in respondent's brief in opposition.[2]

B. Resolving The Question Presented In The Government's Favor Would Change The Outcome Of The Case

In the alternative, respondent contends that certiorari should be denied even if *Penuliar* did rely on the fact that Section 10851(a) reaches aiding and abetting, because the Ninth Circuit's ultimate decision—that a violation of the statute is not categorically a "theft offense"—is still correct. Br. in Opp. 7, 17-26. That is so, according to respondent, because Section 10851(a) includes

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[2] Respondent is mistaken in his contention that the Ninth Circuit "did not discuss aiding and abetting liability" in its initial opinion in *Penuliar*. Br. in Opp. 9. Like the amended opinion, the initial opinion explicitly held that Section 10851(a) is broader than the generic definition "for the same reason" that was applicable to the theft statutes at issue in *Corona-Sanchez* and *Martinez-Perez*—namely, that it covers aiding and abetting. *Penuliar* v. *Ashcroft*, 395 F.3d 1037, 1044 (2005), amended, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006). Respondent is also mistaken in his contention that the inclusion of a response to the government's rehearing petition in the amended opinion "reinforces the conclusion that the holding does not pertain to aiding and abetting liability." Br. in Opp. 9. On the contrary, if the ground for the decision in *Penuliar* were what respondent says it was, the most obvious response to the rehearing petition would have been that it is *irrelevant* whether the generic definition of "theft offense" includes aiding and abetting (not that the definition does *not* include aiding and abetting).

the term "accessory," an "accessory" under California Penal Code § 32 is an accessory after the fact, and an accessory after the fact to a theft has not committed a generic "theft offense." *Ibid.* As a consequence, respondent argues, there is "an alternate ground for affirmance" even if the government's reading of *Penuliar* is correct. *Id.* at 7, 17. Respondent did not make that argument in his briefs to the Board of Immigration Appeals and the court of appeals, and it is therefore not properly before this Court. In any event, the argument is mistaken.

1. As an initial matter, while it is true that "accessory" as used in California Penal Code § 32 is an accessory after the fact, it is not clear that Section 10851(a) reaches accessories after the fact. California Penal Code § 32 appears to set forth an offense *(i.e.*, a proscription of certain conduct), rather than defining a term ("accessory") for purposes of giving meaning to that term where it appears elsewhere in California statutes. Support for that view is found both in the language of Section 32 itself[3] and in the fact that the very next section of the Penal Code describes the penalties for the offense of being an accessory, see Cal. Penal Code § 33 (West 1999).

Even if Section 32 defines a *term*, however, respondent cites no case holding that "accessory" in Section 10851(a) of the *Vehicle Code* has the same meaning it has in Section 32 of the *Penal Code*. That conclusion is in fact undermined by a comparison of the texts of the two provisions. Section 32 of the Penal Code describes conduct after completion of the felony that is intended to conceal the crime or enable the principal to avoid punishment (see note 3, *supra*), while Section 10851(a) of the Vehicle Code

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[3] Section 32 provides that

[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

describes conduct involved in the commission of the offense itself (being "a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" of a vehicle). Indeed, the very California decision on which the Ninth Circuit relied in *Penuliar* for the proposition that Section 10851(a) reaches aiders and abettors, see 435 F.3d at 970, suggests that it does not reach accessories after the fact. Instead, that case suggests that the statutory phrase "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" is merely shorthand for aider and abettor. See *Clark*, 251 Cal. App. 2d at 874 (to convict a defendant on the theory that he was "a party or [an] accessory to or an accomplice in the driving," it must be shown that the defendant "aided or assisted" in the driving with the requisite state of mind).

2. Even if Section 10851(a) reaches accessories after the fact, and even if the statute is therefore broader than the generic definition of "theft offense" in the INA, a holding by this Court that the generic definition includes aiding and abetting will still change the outcome of the case. If this Court were to hold that the California statute covers accessories after the fact, all that would follow is that a violation of the statute is not a "theft offense" as a "categorical" matter. It would not follow that respondent's offense is not a "theft offense" under the "modified categorical" approach.

In *Penuliar*, as in this case, the alien was charged with violating Section 10851 as a principal.[4] Applying the "modified cate-

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[4] Penuliar was charged with

> unlawfully driv[ing] and tak[ing] a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE # 3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

435 F.3d at 971 n.8. A second charge against Penuliar was "identical in its language, except that it list[ed] a different car, license number, and owner."

gorical" approach, the Ninth Circuit held that the charging instruments were nevertheless "insufficient to unequivocally demonstrate that [the alien] actually *pled guilty* to activity of a principal," because "under California law an accusatory pleading against an aider or abettor may be drafted in an identical form as an accusatory pleading against a principal." *Penuliar*, 435 F.3d at 971 (emphasis added). The same is not true, however, of an accusatory pleading against an accessory after the fact. "[W]hile it is now generally accepted that a defendant may be charged as if a principal and convicted on proof that he aided another, a conviction as an accessory after the fact cannot be sustained upon an indictment charging the principal crime." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.6, at 405 (2d ed. 2003) (footnote omitted).[5] The reason for the distinction is that, as respondent recognizes, accessories after the fact "are not liable, as aiders and abettors are, for the underlying offense of the principal." Br. in Opp. 12; see *id.* at 20 n.17 (citing cases).

Accordingly, even if Section 10851(a) covers accessories after the fact, a defendant charged with violating the statute as a prin-

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Ibid. For his part, respondent was charged with

> willfully and unlawfully driv[ing] or tak[ing] a certain vehicle, to wit: 1992 Honda Accord, California license number 3JHJ638,[] then and there the personal property of Deborah and Michael Wood, * * * without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle.

Pet. App. 13a.

[5] That is the law in California. See, *e.g.*, *People* v. *Prado*, 67 Cal. App. 3d 267, 271 (1977) ("a person charged in an indictment as principal cannot be convicted on evidence showing him to be only an accessory after the fact") (quoting 1 Francis Wharton, *Wharton's Criminal Law* § 285, at 373 (12th ed. 1932)); *People* v. *Baker*, 330 P.2d 240, 245 (Cal. Ct. App. 1958) (defendant "was charged and prosecuted as a principal" and therefore "could not have been convicted as an accessory"), cert. denied, 359 U.S. 956 and 361 U.S. 851 (1959); 17 Cal. Jur. 3d *Criminal Law: Core Aspects* § 124, at 192 (2002) ("one charged as a principal cannot be convicted on proof that he or she was an accessory").

cipal has necessarily *not* been convicted as an accessory after the fact, and therefore *has* been convicted of a "theft offense" under the "modified categorical" approach—unless the generic definition excludes aiding and abetting. Because *Penuliar* holds that the generic definition of "theft offense" *does* exclude aiding and abetting, a contrary holding by this Court on that issue will change the outcome of this case, as well as that of the many others in which the alien was charged with violating Section 10851(a) as a principal. Indeed, if the generic definition of "theft offense" includes aiding and abetting, it makes little practical difference whether the government is required to meet its burden under the "categorical" or the "modified categorical" approach, because, in the vast majority of cases of this type, the same documents that establish the fact of conviction—the charging instrument and corresponding judgment—also establish that the alien was convicted as a principal or an aider and abettor.

3. In any event, the rule challenged by the government—that the generic definition of "theft offense" excludes aiding and abetting—is not limited to cases involving a violation of Section 10851(a). The Ninth Circuit has applied the rule to California theft statutes that do not include the term "accessory." See *Corona-Sanchez*, 291 F.3d at 1207-1208 (general theft under California Penal Code § 484(a) (West 1999)); *Martinez-Perez*, 417 F.3d at 1027-1028 (grand theft under California Penal Code § 487(c) (West 1999)). Accordingly, even if respondent is correct about the significance of that term in Section 10851(a), the exclusion of accessory-after-the-fact liability from the generic definition of "theft offense" could not provide an alternative basis for holding that an alien charged with violating a *different* theft statute in California (or any other State) has not been convicted of a

"theft offense" under either the "modified categorical" *or* the "categorical" approach.[6]

C. The Question Presented Is Ripe For This Court's Review

Respondent contends that it would in any event be premature for this Court to grant certiorari, because the Ninth Circuit recently granted rehearing en banc in *Vidal*, *supra*. Respondent is again mistaken.

Contrary to respondent's contention, the Ninth Circuit does not "appear[] ready" in *Vidal* "to address the question presented by the Government" in this case. Br. in Opp. 29. *Vidal* involves the question whether a violation of Section 10851(a) is a "theft offense" under Section 2L1.2 of the Sentencing Guidelines. That guideline, unlike the INA provision at issue here, explicitly includes aiding and abetting in the definition. See Sentencing Guidelines § 2L1.2, comment. (n.5). The three-judge panel in *Vidal* unanimously distinguished *Penuliar* on that ground, see 426 F.3d at 1015; *id.* at 1018 (Browning, J., concurring in part), and the question presented in this case is not one of the questions presented in the petition for rehearing en banc in *Vidal*, see 04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 2-17. The Ninth Circuit has already denied rehearing en banc on that question, moreover, in *Penuliar* itself. 435 F.3d at 964.

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[6] Respondent contends that *Martinez-Perez* held that California's grand-theft statute is broader than the generic definition of "theft offense," not because "the generic definition of theft does not include *any* liability for aiding and abetting," but because "California aiding and abetting liability is particularly broad." Br. in Opp. 16. That is not correct. The Ninth Circuit has held that aiding and abetting is not part of the generic definition because one can aid and abet a theft without engaging in what that court considers an essential element of a generic "theft offense": "a taking of property or an exercise of control over property." *Martinez-Perez*, 417 F.3d at 1027 (quoting *Corona-Sanchez*, 291 F.3d at 1205). That would be true under *any* definition of aiding and abetting, which necessarily encompasses "assist[ing] or facilitat[ing] the commission of a crime." *Black's Law Dictionary* 76 (8th ed. 2004).

Respondent correctly points out (Br. in Opp. 8, 29) that the Ninth Circuit may decide in *Vidal* whether a violation of Section 10851(a) is not categorically a "theft offense" under the Guidelines because the statute includes the term "accessory" and the Guidelines do not explicitly cover accessory-after-the-fact liability. See 04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 2, 5-7. A decision in favor of the defendant on that issue, however, would have no effect on the issue in this case. As explained above (at 5-8), even if the inclusion of "accessory" in Section 10851(a) means that a violation of that statute is not categorically a "theft offense," an alien charged *as a principal* has been convicted of a "theft offense" under the "modified categorical" approach if "theft offense" includes aiding and abetting and, in any event, the Ninth Circuit has applied the rule challenged here to statutes that do not include the term "accessory."

There are a number of other issues raised in the rehearing petition in *Vidal*.[7] But it is not clear which, if any, of those issues the en banc court will address. Moreover, none of the other issues affects the question presented in this case—whether "theft offense" under the INA includes aiding and abetting—and it is not clear how, if at all, the Ninth Circuit's decision on any of them would affect the ultimate disposition of this case in any other respect. Those other issues, therefore, provide no basis for postponing resolution of the question presented in this case. Further delay would be particularly unwarranted because of the large number of immigration cases affected by the Ninth Circuit's rule that "theft offense" in 8 U.S.C. 1101(a)(43)(G) altogether ex-

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[7] They are: whether aiding and abetting under California law is broader than "generic" aiding and abetting (04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 2-3, 8-13); whether the generic definition of "theft offense" includes temporary or *de minimis* deprivations of property (*id.* at 3-4, 13-15); and whether a defendant can be deemed to have been convicted of a "theft offense" under the "modified categorical" approach when the charging instrument merely tracks the language of the statute (*id.* at 4-5, 16-17).

cludes aiding and abetting, see Pet. 15-21; because that rule is clearly erroneous and conflicts with the rule applied in other circuits; and because there is likely to come a point in the near future at which the issue no longer reaches the Ninth Circuit, inasmuch as the Board of Immigration Appeals is bound by that court's decisions in cases arising there, see, *e.g.*, *In re Anselmo*, 20 I. & N. Dec. 25, 31-32 (B.I.A. 1989).[8]

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SEPTEMBER 2006

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[8] The petition notes (at 21-22) that the pending immigration-reform bills would amend 8 U.S.C. 1101(a)(43)(U) explicitly to include aiding and abetting but that no conference committee has even been appointed to reconcile the bills, which differ in significant respects. As of the date of the filing of this reply brief, it is still the case that no conference committee has been convened, and thus it remains uncertain whether legislation addressing the question presented in this case will be passed. Contrary to respondent's contention (Br. in Opp. 29 n.28), therefore, the pendency of those bills provides no basis for denying certiorari.